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PARTISAN GERRYMANDERING IN THE POST-*BANDEMER* ERA

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Last year, the Supreme Court decided a case dealing purely with the issue of partisan gerrymandering for the first time.[1] The Court unequivocally ruled gerrymandering to be justiciable, but failed to assemble a majority behind any standard. Consequently the task of developing a measure of partisan gerrymandering has become urgent.

In an earlier article[2] we argued that the main obstacle to effective court action against partisan gerrymandering was the lack of a clear, precise measure of partisan gerrymandering.[3] We developed a specific political measure and demonstrated it in a case study. Recognizing the difficulty of measuring gerrymandering, we urged other scholars to address the issue. In the ensuing years, there has been much written on the subject.[4] Since the Court has opened the

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1. Davis v. Bandemer, — U.S. —, 106 S. Ct. 2797 (1986). We will hereinafter refer to this case, at both district and Supreme Court levels, as *Bandemer*.

2. Backstrom, Robins & Eller, "*Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota*," 62 MINN. L. REV. 1121 (1978).

3. We do not address remaining questions involving racial gerrymandering in this article, although we must point out that in Bandemer v. Davis, 603 F. Supp. 1479 (S.D. Ind. 1984), alleged racial inequities were subsumed under the main issue of partisan gerrymandering because of the overwhelming Democratic preference of Blacks. *Id.* at 1490.

4. REPRESENTATION AND REDISTRICTING ISSUES (B. Grofman, A. Lijphart, R. McKay, & H. Scarrow eds. 1982); Cain, *Simple vs. Complex Criteria for Partisan Gerrymandering*, 33 UCLA L. REV. 213 (1985); Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77 (1985); Grofman, *Measures of Bias and Proportionality in Seats-Votes Relationships*, 9 POLITICAL METHODOLOGY 295 (1983); Grofman & Scarrow, *Current Issues in Reapportionment*, 4 LAW & POLICY Q. 435 (1982); Lowenstein & Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?* 33 UCLA L. REV. 1 (1985); Niemi, *The Relationship Between Votes and Seats: The Ultimate Question in Political Gerrymandering*, 33 UCLA L. REV. 185 (1985); Niemi & Deegan, *A Theory of Political Districting*, 72 AM. POL. SCI. REV. 1304 (1978); Scarrow, *Partisan Gerrymandering—*

door to considering partisan gerrymandering, we turn again to the challenge of crafting an effective test for gerrymandering. Our fundamental approach—the need for a *political* measure for a political problem—remains largely unchanged, but we have modified some of our arguments to address the concerns raised by several Justices.

This article begins with a review of the important cases since 1978 involving legislative districting. Next it reviews the arguments that culminated in the current decision that partisan gerrymandering is justiciable. It then assesses various measures that have been proposed to determine the presence of unconstitutional partisan gerrymandering, including those suggested by various members of the Supreme Court. In addition to a political measure, these include structural factors (such as compactness), and procedural matters (such as intent). We then present our reformulated standard for judging partisan gerrymandering, and conclude by laying out a set of decision rules that courts should use in determining whether unconstitutional partisan gerrymandering is present in a given legislative districting plan.

I. DEVELOPING STANDARDS IN RECENT REAPPORTIONMENT DECISIONS

A. POPULATION DISPARITIES

Redistricting challenges in the 1980s focused primarily on population equality among the districts. The courts also continued to distinguish between congressional districting and state legislative districting.[5]

In congressional districting, one court rejected an Arkansas redistricting plan with population disparities of less than 2 percent,[6] but another federal court sustained a Pennsylvania plan with deviations of 0.4 percent.[7] The court's willingness to accept this small deviation seemed to augur well for the establishment of a *de minimis* population variation of up to 1 percent. But this speculation proved inaccurate when in *Karcher v. Daggett*[8] Justice Bren-

Invidious or Benevolent? Gaffney v. Cummings and Its Aftermath, 44 JOURNAL OF POLITICS 810 (1982); Shapiro, *Gerrymandering, Unfairness, and The Supreme Court*, 33 UCLA L. REV. 227 (1985); B. Grofman, Criteria for Single-Member Districting (mimeograph ed. 1983).

5. *See, e.g.*, Mahan v. Howell, 410 U.S. 315, 320-22 (1973) (distinguishing between article I, section 2 of the U.S. Constitution as the source of requirements for Congressional districting, and the equal protection clause of the fourteenth amendment as the source for requirements for districting of state legislatures).

6. *See* Doulin v. White, 528 F. Supp. 1323 (E.D. Ark. 1982).

7. *See In re* Pennsylvania Congressional Districts Reapportionment Cases, 535 F. Supp. 191 (M.D. Penn. 1982).

8. 462 U.S. 725 (1983).

nan, writing for a five-person majority, invalidated a New Jersey congressional districting plan with maximum population deviations of 0.6984 percent. Statistical experts testified that, given the inaccuracy of census data, there may be no difference in the actual populations of these districts. But ignoring this well-documented evidence, the Court took the numbers at face value. The Court held that "there are no *de minimis* population variations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, Sec. 2, without justification."[9]

A different pattern appeared in lower-court rulings on state legislative districting. Guided by the 16.4 percent "tolerable limits" population variance permitted in *Mahan v. Howell*, lower courts sanctioned population deviations of nearly 14 percent in New Hampshire[10] and 11 percent in Montana.[11] A successful challenge was made to a Virginia redistricting plan containing a deviation of 26.63 percent.[12] Hawaii senate deviations of 43.13 percent were found "facially unconstitutional," while 9 percent house deviations on the island of Oahu were declared unconstitutional because they appeared to lack any justification.[13]

Again, the Supreme Court rejected the emerging consensus in the lower courts. In *Brown v. Thomson*,[14] Justice Powell, writing for a five-to-four majority, appeared to reduce the permissible *de minimis* deviation, holding that anything over 10 percent would constitute "prima facie constitutional violations" requiring justification. Yet *Brown* went on to approve a Wyoming state legislative plan that permitted an 89 percent population deviation between districts, on the ground that it was necessary to continue Wyoming's county representative system.

The apparent—and dismaying—ease with which huge population disparities were justified in *Brown* predictably encouraged state legislatures to strain the one person/one vote principle. The Second Circuit has cited *Brown* as underscoring the latitude afforded state and local governments in the districting process.[15] The Idaho Supreme Court, citing *Brown*, indicated in dicta that a 41.3 percent deviation "would still pass muster under federal constitutional standards."[16]

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9. *Id.* at 734. This holding was consistent with the Court's early refusal to allow any unjustified deviation from absolute equality. *See* Kirkpatrick v. Preisler, 394 U.S. 526 (1969).

10. *See* Boyer v. Gardner, 540 F. Supp. 624 (D.N.H. 1982).

11. *See* McBride v. Mahoney, 573 F. Supp. 913 (D. Mont. 1983).

12. *See* Cosner v. Dalton, 522 F. Supp. 350 (E.D. Va. 1981).

13. *See* Travis v. King, 552 F. Supp. 554 (D. Haw. 1982).

14. 462 U.S. 835, 842-43 (1983).

15. League of Women Voters v. Nassau County Board, 737 F.2d 155 (2d Cir. 1984).

16. Hellar v. Cenarrusa, 682 P.2d 524 (1984). Not all judges are persuaded that equal

Although the connection is often overlooked, population equality is closely linked to the gerrymandering issue. Population equality, while remaining in its own right the key criterion for judging redistricting plans, is also essential because any deviation from it is almost certainly a strong indication of a possible partisan gerrymander.

Historically, the original attack on gerrymandering was made using measures of population inequity. Courts developed a variety of measures, but eventually sifted out and accepted one that was relatively simple to compute and understand. The percentage range between the extreme population districts, using the U.S. Census's decennial full-population count, is the sole measure in use today.[17]

Because "one person/one vote" has such great symbolic appeal to the equalitarian values in a democracy, it really has been forgotten that until *Baker v. Carr* population disparities among districts were allowed to continue or were created deliberately to benefit some group. Rural people as a class kept control of many legislatures through the "silent gerrymander"[18] of not readjusting district lines to follow urban growth.

Population gerrymanders protected not only regional and economic interests, but also conferred partisan advantage. Unequal districts were perpetuated not only for their own sake, but because they conferred an unfair advantage in the legislative struggle. In the North and East the Republicans preserved what Al Smith called a "constitutional majority," while the Democrats in the Southwest did the same for themselves to a lesser degree.[19]

Requiring population equality thus constrains unfair group advantage and assists in the control of partisan gerrymandering. At the same time, however, exclusive attention to population constitutes a trap into which courts can fall by thinking that achievement of population equality cures all inequity. It may have led to the Supreme Court's intolerance of ever-smaller population differences,

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population standards should be so weakened, as illustrated by Justice Shepard, dissenting, who called *Brown* a 3-2-4 decision that "simply cannot be reconciled with previous opinions of the Court" or with the *Karcher* opinion enunciated the same day. *Id.* at 534-35.

17. The measure of population equality now used has two forms: a) how much the population of the largest or smallest district differs from the "ideal" district (figured by dividing the state's population by the number of seats in the legislative chamber understudy), shown as a ratio (e.g., 1.15 to 1.00) or a percentage (15 percent), or b) the ratio or percentage by which the largest district exceeds the smallest (if the largest is 4 percent above ideal and the smallest 3 percent below, the range is 7 percent).

18. *See* G. BAKER, RURAL VERSUS URBAN POLITICAL POWER 13 (1955).

19. M. JEWELL & S. PATTERSON, THE LEGISLATIVE PROCESS IN THE UNITED STATES 51 (1966).

as in *Karcher*.[20] This action also compels lower courts to be obsessed with ever tinier numbers: on remand of *Karcher*, for example, the district court chose the one plan of three with the smallest variation—twenty-five persons;[21] and in Minnesota, the three-judge court protected themselves against further challenge by designing congressional districts as close as one person from the ideal size.[22]

The current state of affairs cries out for a *de minimis* standard that is real but low. We recommend 1 percent in Congressional districts (5000 people), and 5 percent in legislative districts (1500 people for house districts in a state with Minnesota's median state district size—total state population divided by size of the legislative body). This will put the burden of proof on the challenging party, where it belongs. The 5-percent allowance keeps a strong emphasis on population equality but will avoid challenges to normal legislative action on districting. More important, it establishes the principle that the larger the deviation the greater the justification that is required. The allowance also precludes thoughtless substitution of a clever partisan gerrymander just because it is arithmetically "better" than the official plan on population.

B. PARTISAN GERRYMANDERING

Although the Supreme Court had never overturned a districting plan on the basis of partisan gerrymandering, several opinions prior to *Bandemer* had recognized the political nature of redistricting.[23] In *Karcher*, one approach to partisan gerrymandering was explored by Justice Stevens's lengthy concurrence.[24] Drawing on

20. Karcher v. Daggett, 462 U.S. 725, 738 (1983).

21. Daggett v. Kimmelman, 580 F. Supp. 1259 (D.N.J. 1984).

22. LaComb v. Growe, 541 F. Supp. 145, 149 (D. Minn. 1982). This fixation on population equality can lead to overlooking the phenomenon of the equi-populous gerrymander. R. Engstrom, The Supreme Court and Equi-Populous Gerrymandering 38 (paper presented at the annual meeting of the American Political Science Association [hereinafter APSA], San Francisco, CA (1975)). Since the *Bandemer* plurality failed to indict the gerrymander in Indiana, Justice Powell accuses them of asserting that achieving one-person/one vote precluded the existence of a gerrymander, a trap that some of the early districting reformers fell into, but to us this charge seems unfair.

Although we do not agree with those who argue that equal population requirements make partisan gerrymandering *easier* (*see* R. DIXON, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT LAW AND POLITICS 18 (1968))—every constraint in district drawing makes it harder—we have earlier demonstrated that tremendous opportunities exist for achieving partisan advantage *within* tight population standards without unduly straining one's cartographic skills. Confining judicial action to population tests engenders a false sense of security about gerrymandering having been foreclosed.

23. *See, e.g.*, Gaffney v. Cummings, 412 U.S. 735 (1973); Wells v. Rockefeller, 394 U.S. 542 (1969). In contrast, a New York state court rejected justiciability of political gerrymandering, calling it "a hopeless morass." Bay Ridge Community Council v. Carey, 115 Misc. 2d 433, 454 N.Y.S.2d 186 (1983), *aff'd*, 479 N.Y.S.2d 746 (A.D. 2d Dept. 1984).

24. Karcher v. Daggett, 462 U.S. 725, 744 (1983) (Stevens, J., concurring).

his separate opinions in *City of Mobile v. Bolden*[25] and *Rogers v. Lodge*,[26] Justice Stevens proposed detailed standards for assessing a potential partisan gerrymander. Stating that "political gerrymandering is one species of 'vote dilution' that is proscribed by the Equal Protection Clause," Justice Stevens clearly delineated the shortcomings of pure population analyses.[27] Moreover, he rejected a narrow focus on legislative intent, noting that "it is unrealistic to attempt to proscribe all political considerations in the essentially political process of redistricting."[28] Justice Stevens asserted that prima facie evidence of political gerrymandering could be found in "drastic departures from compactness,"[29] "extensive deviation from established political boundaries,"[30] or in a procedural history that "excluded divergent viewpoints, openly reflected the use of partisan criteria, and provided no explanation of the reasons for selecting one plan over another."[31] The state could overcome this presumption by demonstrating that "the plan as a whole embodies acceptable, neutral objectives."[32] Applying his standards to the New Jersey plan, Justice Stevens found unjustifiable violations of compactness, a decision-making process that was "far from neutral," and concluded that the state had advanced no legitimate justifications for the irregularities of the plan.[33]

Partisan gerrymandering was squarely addressed by a federal district court in 1984. In *Bandemer v. Davis*[34] the majority of a three-judge district court found that the 1981 Indiana apportionment act violated the equal protection clause by diluting the voting strength of Democrats. Drawing heavily upon Justice Stevens's concurrence in *Karcher*, the *Bandemer* majority found that many "bright lines"[35] pointed toward an anti-Democratic gerrymander. The majority found indications of partisan gerrymandering in the contorted shapes of many of the districts, the inconsistent use of multi-member districts, and the "unashamedly partisan" motiva-

25. 446 U.S. 55, 83 (1980), (Stevens, J., concurring in the judgment).

26. 458 U.S. 613, 631 (1982), (Stevens, J., dissenting).

27. *Karcher*, 462 U.S. at 750-53 (Stevens, J., concurring) (*citing* Backstrom, Robins, & Eller, *supra* note 2, at 1131-39).

28. *Id.* at 753.

29. *Id.* at 758.

30. *Id.*

31. *Id.* at 759.

32. *Id.* at 760.

33. *Id.* at 764-65. In addition, Justice Powell, while dissenting from the majority in *Karcher*, agreed with many of Justice Steven's conclusions and explicitly stated that he was prepared to entertain constitutional challenges to partisan gerrymandering.

34. 603 F. Supp. 1479 (S.D. Ind. 1984).

35. Brief for Appellee at 43, Davis v. Bandemer, — U.S. —, 106 S. Ct. 2797 (1986) (No. 84-1244).

tion for the districting plan.[36] Population variation was not an issue, because the approximately 1 percent deviation was well within prior standards for state legislative districting.[37] The court concluded that Democrats were an "identifiable political group whose voting strength has been diluted" within the meaning of Justice Stevens's *Karcher* concurrence[38] and that the prima facie showing of gerrymandering was not rebutted by the official district drawers.[39]

On appeal, the Supreme Court reversed, sustaining the constitutionality of the Indiana redistricting plan.[40] A 6-3 majority held that partisan gerrymandering claims are justiciable. But writing for a different 7-2 majority, Justice White found that the evidence produced in the Indiana case was insufficient to meet the "high standard" required to overturn a districting plan. In dissent, Justice Powell, joined by Justice Stevens, essentially restated the arguments presented by Justice Stevens in *Karcher* and agreed with the district court's finding of unconstitutional partisan gerrymandering.[41] Justice O'Connor, joined by Justice Rehnquist and Chief Justice Burger, agreed that the lower court should be reversed, but dissented from the holding that partisan gerrymandering is justiciable.[42] We will analyze the *Bandemer* opinions in detail in the next two sections.

II. *BANDEMER* AND THE JUSTICIABILITY OF GERRYMANDERING

First reports on the *Bandemer* decision in the media emphasized that the Court had approved the confessed gerrymander in Indiana. The noteworthy aspect of the opinion was, however, that the Court ruled clearly for the first time that claims of partisan gerrymandering are justiciable. This ruling establishes an important constitutional right—that of members of a political party to have their votes count equally—and it assures them that courts will consider challenges to districting plans that reveal partisan gerrymandering.

The Court actually held that partisan gerrymandering is not a "political question." The majority settled on a narrow definition of this term, confining it mainly to matters relating to separation of powers. Examples would be cases involving foreign policy matters

36. *Bandemer*, 603 F. Supp. at 1486-89.
37. *Id.* at 1485.
38. *Id.* at 1493 (*citing Karcher*, 462 U.S. at 744 (Stevens, J., concurring)).
39. *Id.* at 1495.
40. Davis v. Bandemer, — U.S. —, 106 S. Ct. 2797 (1986).
41. *Id.* at 2825. (Powell, J., concurring in Part II, and dissenting).
42. *Id.* at 2816. (O'Connor, J. concurring in the judgment).

where judicial intervention could cause grave international problems. The Court used this argument in *Baker v. Carr*[43] to make way for court action to remedy discrimination arising from unequal numbers of people assigned to the various legislative districts.

Although *Baker v. Carr* was decided on that narrow ground, Justice Brennan's opinion adumbrated several other criteria for political questions. These included the lack of discernible and manageable judicial standards, the necessity for the court to make a prior public policy choice before reaching the question at issue in the case at bar, or the need to avoid the confusion that would result if the court did not adhere to a political decision already made.[44] In *Bandemer*, Justice O'Connor argued that there is no way to measure partisan gerrymandering; absolute equality among partisans in a legislature could be achieved only with proportional representation, a "prior policy choice" by the Court that would undo the district system that has established itself as a foundation of American representation and a key to preservation of the two-party system. Trying to decide claims of fairness between parties in election matters is a political thicket that courts should avoid.[45] In response, Justice White pointed out that standards do not have to be available at the very moment that a constitutional evil is identified. The question in *Baker v. Carr*, after all, was not whether unequal population representation was unfair, but whether the courts should step in and decide whether it was unfair—in other words, whether the issue was justiciable. *Baker v. Carr* turned on this issue alone; the case's significance lay in the Supreme Court's readiness to deal with the issue of comparative legislative district population. The application of actual measures of inequality and the setting of standard of equality, however, were left to *Reynolds v. Sims*[46] and its progeny.[47]

Those who oppose granting justiciability for partisan gerrymandering can do so without reaching the question of adequacy of measures. They can object because they believe that (a) partisan politics does not matter in state legislative races or actions and therefore the allegation of a political gerrymander is irrelevant to public affairs; (b) districting is inherently and irremediably, or even

43. 369 U.S. 186 (1962).

44. *Id.* at 217.

45. 106 S. Ct. at 2816.

46. 377 U.S. 533 (1964) (holding that malapportionment of the Alabama state legislature violated the equal protection clause of the fourteenth amendment).

47. *See, e.g.* Karcher v. Daggett, 462 U.S. 725 (1983); Mahan v. Howell, 410 U.S. 315 (1973); Kirkpatrick v. Preisler, 394 U.S. 526 (1969); Wells v. Rockefeller, 394 U.S. 542 (1969).

beneficially, a matter of political judgment; or (c) courts would be hurting themselves politically if they tried to alleviate gerrymandering. We will deal with these allegations in turn.

A. THE SIGNIFICANCE OF PARTIES

Although Justice O'Connor values the two-party system, she denies that a political party is an entity that could be harmed. She assumes that people at the polls vote for individual candidates and not for the statewide party,[48] and categorizes *Baker v. Carr* as turning on an individual's right to vote, not a group right.[49] She asserts that an individual voting in a statewide election cannot be harmed by an outcome that results from happenings outside his or her own district. She ridicules that concept by using the congressional analogy which asserts that voters in one state were harmed by election results in another state.[50] Also, if party "members" are to be counted, Justice O'Connor sees no fair way to count independents.[51] Justice O'Connor concludes that a political party is not an identifiable group that can be given constitutional protection. Finally, she is troubled that, in contrast to race, adherence to a political party is not immutable.[52]

Parties play crucial roles in state elections. Political scientists have noted the decline in partisan identification among voters, and the willingness of voters to support incumbent Congressmen irrespective of party, based on personal service.[53] Nevertheless party identification remains the most salient cue for voters in races where they have little other information.[54] All party candidates prefer to run in a district where more of their fellow partisans are concentrated because it gives them a basis for trust and confidence from which to build. Indeed, a prominent scholar of state politics finds that parties are growing stronger, not weaker, at the state level.[55]

Once legislators are in office, moreover, they form caucuses to advance their personal and program goals. The majority caucus will usually control all leadership positions and install all committee chairs, thus dominating the rules and agenda. Caucuses may meet to discuss bills, and while it would be rare to "lay on the whips" to

48. 106 S. Ct. at 2821.
49. *Id.* at 2819.
50. *Id.* at 2821.
51. *Id.* at 2822.
52. *Id.* at 2823.
53. W. CROTTY, AMERICAN PARTIES IN THEIR DISTRICT DECLINE 210-16 (1984); R. FENNO, HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS 113 (1978); Mayhew, *Congressional Elections: The Case of the Vanishing Marginals*, 6 POLITY 295 (1974); .
54. W. CROTTY, *supra* note 53, at 210.
55. S. MOREHOUSE, STATE POLITICS, PARTIES, AND POLICY 29-30 (1981).

back a party position, the subtle pressure to go along with party leaders increases the significance of party in policy outcomes. It is true that voting in state legislatures does not always follow party lines, but there is likely to be some ideological distinction between the center of gravity of the two major parties. Votes on crucial matters like spending, taxation, business regulation, and labor law will more typically divide by party.[56]

Usually legislative coalitions are closely related to the party designations under which the candidates ran in the election. Legislative leaders are likely to be prominent in state party activities, especially in the formation of platform positions. State party organizations, or the legislative caucuses themselves, often raise funds collectively to assist their members to win reelection, and some opposition members will be targeted for defeat in hopes of gaining or retaining a working majority.

With all of this partisan activity in the election of and operation of legislatures, it is important to insure a fair base from which to start the partisan contest. There now may be more independents among voters, but at the polls they almost always must choose between the Republican and the Democratic candidates. And whatever their motivation for supporting a particular candidate on election day, voters—independents along with partisans of various strengths—will probably end up with a partisan member, or one who at least must operate in the highly partisan milieu of legislative caucus politics.

Legislators and state political activists go through such agony and pryotechnics on this issue because they believe it to be vital to election outcomes and legislative action. Absent overwhelming evidence to the contrary, it would seem foolish for courts to disagree with this assessment.

B. THE POLITICS OF REDISTRICTING

Justice O'Connor does not see partisan gerrymandering as an evil that needs to be dealt with by the courts. First she argues that gerrymandering is one of the legitimate spoils of the majority party.[57] Then she says that parties can fend for themselves without judicial aid.[58] Political gerrymandering is self-limiting, she argues, because the majority party could dangerously weaken its hold on

56. *See* M. JEWELL & D. OLSON, AMERICAN STATE POLITICAL PARTIES AND ELECTIONS 290 (rev. ed. 1982); LeBlanc, *Voting in State Senates: Party and Constituency Influences*, 13 MIDW. J. POL. SCI. 33, 56 (1969).

57. Davis v. Bandemer, — U.S. —, 106 S. Ct. 2797, 2820 (1986).

58. *Id.*

some seats if it overreaches by putting too many of its partisans into an adjacent district in an attempt to control it too.[59] Finally, according to Justice O'Connor, most gerrymanders are bipartisan anyway, so neither party is really hurt.[60] Perhaps incumbent legislators are actually more interested in protection of their own seats than in the advancement of their party's overall interest.[61] In short, "politicians will be politicians."

This idea is, we believe, dangerous to the political ethos of a democracy. Popular support for laws depends upon the losers in this legislative election believing that they have a fair chance to be the victors in the next. A gerrymander sets up a basic handicap to fair competition between the major contenders for political power. If gerrymandering has unfairly increased the likelihood of an erstwhile majority's ten-year control of the legislature, this consensus would be lost, and the resultant unbounded cynicism would corrode the political compact. The assertion that parties can fend for themselves is merely the updated version of Justice Frankfurter's view that the remedy for population inequalities was for the voters to "sear the consciences of their lawmakers."[62] What actually happened was that as population inequalities widened, the advantaged groups hung onto them more tightly.

C. Political Damage to Courts

Justice O'Connor's main reason for rejecting judicial involvement in partisan gerrymandering was clearly her belief that it is a risky area for judicial action, a political thicket that courts would be well-advised to avoid.[63] Political damage to the courts is likely to be found when courts confront three kinds of issues: (1) a problem that the courts are not good at solving—or may be even worse at solving than some other branch, in this instance the legislature; (2) a problem on which court action could have no effect, or (3) a problem that can cost the courts political support and credibility.[64]

Under these three criteria, partisan gerrymandering is not a thicket. First, the courts *are* actually more suitable for handling reapportionment than legislatures for three reasons. Courts are

59. *Id.*, (*citing* B. CAIN, THE REAPPORTIONMENT PUZZLE, 151-59 (1984)).
60. *Id.* at 2821.
61. *Id.* at 2822.
62. *Baker*, 369 U.S. at 270 (Frankfurter, J., dissenting).
63. *Bandemer*, 106 S. Ct. at 2816.
64. *See* C.H. PRITCHETT, THE AMERICAN CONSTITUTIONAL SYSTEM 82-83 (3d ed. 1971) (distinguishing between political question and political thicket, but associating them as ways in which the Court avoids issues). In contrast, Justice Frankfurter did not distinguish between the terms. Baker v. Carr, 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting).

freer to develop and follow standards than the legislature, where compromise is a way of life. Judges are free from conflicts of interest involving the security of their own jobs. If legislative reapportionment is left to legislators without judicial supervision, however, that task must be done by people with a monumental conflict of interest. Second, as to the efficacy of court action on gerrymandering, the courts have shown that they can affect reapportionment: they can void elections, make legislators redraw a plan, or draw a better plan themselves.[65] Third, the courts will not suffer politically from correcting gerrymandering because, as in population redistricting where opposition blew over quickly, there will be gainers as well as losers. Avid partisans undoubtedly would be elated to receive a special advantage in elections, but they cannot claim gerrymandering is fair, and therefore cannot openly urge it. Unlike the little federalism argument for defending population inequalities, which almost negated *Baker v. Carr* through the Dirksen Amendment,[66] no rational argument could be made to favor unfair partisan advantage.

The courts do, however, need assistance in developing clear criteria for detecting and measuring partisan gerrymandering. This is essential for ultimate acceptance of a judicial remedy. Without them there is a serious danger that the Court will ultimately adopt a post-election proportional representation standard which Justice O'Connor correctly fears and warns against. There is also merit in Justice Powell's concern that, as formulated by Justice White for the plurality in *Bandemer*, almost any conceivable plan that meets acceptable population-equality standards would be acceptable from a partisan standpoint. It is to these questions of measures and standards we now turn.

III. DETECTION AND MEASURES OF GERRYMANDERING

Although six Justices agreed that partisan gerrymandering was justiciable, they could not agree amongst themselves on an appropriate measure of gerrymandering. Instead, the plurality of four joined the three Justices who contend that gerrymandering is nonjusticiable to form a 7-2 majority to uphold Indiana's redistricting,

65. There are some limits to judicial discretion. The U.S. Supreme Court reversed a district court's 50-percent reduction of the size of the Minnesota legislature as unnecessary to achieve the goal of equal-population districts. *See* Beens v. Erdahl, 336 F. Supp. 715 (D. Minn. 1972), *vacated and remanded per curiam sub nom.* Sixty-seventh Minnesota State Senate v. Beens, 406 U.S. 187 (1972).

66. *See* CONGRESSIONAL QUARTERLY-SERVICE, CONGRESS AND THE NATION, 1965-1968, at 423-34 (1972).

which Justice Powell labeled a "paradigm example of unconstitutional discrimination."[67] Under these circumstances, we cannot share Justice White's facile optimism that district judges will have no difficulty in crafting acceptable measures of gerrymandering.[68]

In this section we will elucidate and critique the Court's discussion of a satisfactory measure of gerrymandering and analyze other proposed measures. Following that, we present what we think is an appropriate measure.

First, however, a look at what is to be measured. Nowhere does the plurality formally define partisan gerrymandering. At the outset Justice White identifies the issue as vote dilution.[69] Next he states that each political group in a state should have the same chance to elect representatives of its choice as any other political group.[70] This sounds as though no discrimination whatsoever would be tolerated. Later, however, he agrees that some amount of gerrymandering is acceptable. There is also an acceptable level of gerrymanders for Justice Powell. He distinguishes between the common—and to him acceptable—practice of a majority party seeking to advantage itself through choosing a favorable redistricting plan from the use of a high degree of deliberate and arbitrary action as shown by intent and method of district design.[71]

We think confusion would be reduced if the term "gerrymander" were reserved for unconstitutional districting plans.[72] This definition is in contrast to the Justices who call any advantage for one party gerrymandering, but propose to outlaw it only when the advantage-seeking reaches a very substantial degree. To us this seems like saying that there is a degree of larceny that will not be considered a crime.

We strongly agree with the *Bandemer* plurality of the Court that it is not esthetic characteristics like the shape of the districts that constitute the essence of a partisan gerrymander, but the unfair political advantage that such district drawing gives to one party over another. Although other elements of legislative districting, such as those included in Justice Powell's dissent, may not be sufficient proof of the presence of a gerrymander, we would not totally dismiss Justice Powell's "neutral factors" as the plurality did.[73]

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67. Davis v. Bandemer, — U.S. —, 106 S. Ct. 2797, 2838 (1986) (Powell, J., dissenting).
68. *Id.* at 2806-07.
69. *Id.* at 2799.
70. *Id.* at 2806.
71. *Id.*
72. Backstrom, Robins, & Eller, *supra* note 2, at 1129. We will continue to use this definition hereinafter.
73. *Bandemer*, 106 S. Ct. at 2815.

The plurality justices[74] focus on two factors: discriminatory intent and discriminatory effect.[75] We will discuss these in turn.

A. Discriminatory Intent and Structural Defects

Since *City of Mobile v. Bolden*[76] an initial hurdle that those claiming to be discriminated aginst must clear is the intent to discriminate. The plaintiffs in *Bandemer*[77] went to great lengths to prove intent. They relied on statements of Republican leaders of the legislature and the exclusionary legislative procedures that insured that Republicans monopolized decisionmaking.[78]

In *Bandemer* the plurality lowered the intent barrier essentially by presuming intent.[79] Having found discriminatory intent with such apparent ease, the plurality rejected as unnecessary Justice Powell's more traditional measures of gerrymandering—compactness, etc.[80]

Justices Powell and Stevens, however, believe that unfair procedures in districting indicate a partisan gerrymander. In Indiana, according to *Bandemer*, these involved exclusion of all Democratic legislators from the committees drawing the districts; utilization of the state Republican committee headquarters for the data work done by a consultant (rather than the legislative research department on the grounds that it was prohibited by statute from doing partisan work); bringing the bill to the floor on the last day of the session without opportunity for the Democrats to examine it; and the open admission that the aim of the majority party was to secure for themselves every possible seat by whatever means or design.[81] Intent alone, however, should not render a districting plan unconstitutional.

Structural measures have both intrinsic bearing on the quality of a redistricting plan and utility as constraints against partisan gerrymandering. In this regard we agree with Justice Powell, although

74. Justices White, Brennan, Marshall, and Blackmun.

75. *Bandemer*, 106 S. Ct. at 2808.

76. 446 U.S. 55 (1980).

77. Bandemer v. Davis, 603 F. Supp. 1479 (S.D. Ind. 1984).

78. Specifically, this included the widely quoted statement by the Republican Speaker of the House that they had intended to gain the biggest possible advantage for their party, and the retaining (on a $250,000 consulting contract) of a Republican-oriented consultant from Detroit, Market Opinion Research, Inc., whose computer programs are known to maximize partisan advantage. In addition, Democrats were excluded from the drafting committee, from which the bill surfaced only forty hours before it was passed. *Id.* at 1483-84.

79. Davis v. Bandemer, — U.S. —, 106 S. Ct. 2797, 2808, 2809 n.11 (1986).

80. *Id.* at 2813-15.

81. Davis v. Bandemer, — U.S. —, 106 S. Ct. 2797 (1986).

we do not elevate them to the status of major tests for a gerrymander as he does.

Several technical or mechanical choices confront those who actually draw legislative districts: whether to use single-member districts, how neatly to outline the districts, and how much consideration should be given to other governmental lines already on the map. We disagree with those who give primary emphasis to such structural indicators in their analysis of gerrymandering, but some of them should be incorporated into standards for quality districting once partisan fairness has been achieved.

(1) Multi-member districts. The Supreme Court has never outlawed the use of multi-member districts in plans drawn by a state legislature.[82] Multi-member districts will be invalidated, however, if "designedly or otherwise, they would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."[83] In addition, the Supreme Court has instructure district courts who draw legislative district lines that they "should prefer single-member districts over multi-member districts, absent persuasive justification to the contrary."[84]

The district court in *Bandemer* held that *inconsistent* use of multi-member districts was ample evidence of intent to gerrymander.[85] The plurality Justices disagreed. Although suspicious of multi-membered districts,[86] they did not find them *per se* constitutionally impermissible. Instead, they reasoned that the very fact that Indiana had not used multi-member districts in every metropolitan area in the state showed that there could not be a statewide discriminatory effect.[87] This ignores the realities of gerrymandering: to design districts of one type where the controlling party can win them, and to avoid that type where it will be to that same

82. Fortson v. Dorsey, 379 U.S. 433 (1965); Burns v. Richardson, 384 U.S. 73 (1966).

83. *Fortson*, 379 U.S. at 439. There is widespread agreement that multi-member districts discriminate against racial minorities. B. Grofman, The Effect of Ward Versus At-Large Elections on Minority Representation: Part I, A Theoretical Analysis; Part II, A Review and Critique of Twenty-Three Recent Empirical Studies (unpub, 1982) (on file with authors). On the effect of multi-member districts on partisan minorities in state legislatures, the evidence is mixed. Considered by districts, the minority party is usually disadvantaged in the multi-member districts themselves, although that party might redress the balance elsewhere in the state in single-member districts. Considered statewide, on the average across states, the disadvantage for the minority party is in the range of 2-3 percent. R. Niemi, J. Hill & B. Grofman, The Impact of Multi-member District Elections on Partisan Representation in State Legislatures 8 (paper delivered at the annual meeting of APSA, Washington, DC (1984)).

84. Wise v. Lipscomb, 437 U.S. 535, 540 (1978).

85. Bandemer v. Davis, 603 F. Supp. 1479 (S.D. Ind. 1984).

86. Davis v. Bandemer, — U.S. —, 106 S. Ct. 2797, 2813 (1986).

87. *Id.*

party's disadvantage. The plurality cites *Whitcomb v. Chavis*,[88] where the Supreme Court had been unwilling to accept mathematical demonstrations of how multi-member districts can discriminate.[89] What that case showed, they recalled, was that the reason blacks did not win more seats is that they did not get enough votes.[90]

In our view, the Court passed up a good opportunity to strike down a districting technique that is undoubtedly a discriminatory practice when used inconsistently. Courts should, in addition, be suspicious of changes from one type of district to another in a new districting act where there could be no historic justification for the practice. In these circumstances the burden should be on the district creators to prove that they have not intended to get nor in fact have gained an unfair pratisan advantage by mixing district types.

(2) Uncompactness. The classic Gerrymander—Governor Gerry's salamander-shaped district—is an area that twists and turns and reaches to include or exclude certain sub-units. It is not compact. The district court in *Bandemer* found numerous horrific examples in Indiana to help persuade them that a gerrymander had been perpetrated.[91] They did not use any rigorous measurement of compactness, relying instead on an optical test—the districts simply looked bad.[92] The Supreme Court plurality, however, did not feel that they needed this evidence to prove intent; they did not consider the matter of compactness, but looked elsewhere for proof of effect.

It is, in truth, difficult to develop a powerful case to demonstrate the intrinsic value in having compact districts: If the representative lived at the center, he or she wouldn't have to travel any

88. 403 U.S. 124 (1971).

89. *Id.*

90. *Bandemer*, 106 S. Ct. at 2813.

91. Bandemer v. Davis, 603 F. Supp. 1479, 1487-88 (S.D. Ind. 1984).

92. The simplest measure of overall district compactness (the one we used in 1973) is the ratio of the actual area of the district to the area of the smallest circle that can be drawn around the district. *See* Reock, *Measuring Compactness as a Requirement of Legislative Apportionment*, 5 MIDW. J. POL. SCI. 70 (1961). (A circular district would have a ratio of 1.00—the ideal—and a sprawling district somewhat less.) Presumably, guidelines to require violations of compactness could be adopted that required the average ratio to be greater than some set figure: 0.4, according to one authority. *See* A. HACKER, CONGRESSIONAL DISTRICTING: THE ISSUE OF EQUAL REPRESENTATION 72 (rev. 1964) (published by The Brookings Institution). Of course, since averages do not point out single egregiously noncompact districts, a measure of the range between the most compact and the least compact districts could be used, but if all districts were noncompact, very bad districts would not seem so extreme. One author cites seven published tests of compactness, including the circle test, points out the faults of each, and proposes his own: minimizing the number of neighboring basic population units assigned to different districts by counting the number of edges cut,—in fact, a measure of the extent to which "neighbors are assigned to different districts." *See* H.P. Young, Measuring the Compactness of Legislative Districts (School of Public Affairs, University of Maryland, August, 1984).

more than absolutely necessary to campaign door-to-door or to meet with constituents. Compactness in districting is a virtue, however, precisely because the long emphasis on visual standards for districts has elevated compactness to a position of preeminent value for the public. But the public cares for symmetry beyond mere esthetics; crooked districts lead the public, often correctly, to suspect crookedness by someone manipulating the districting process in order to gain unfair advantage. This shows the significance of compactness; it is a constraint upon gerrymanderers, but of course it does not of itself guarantee fair districts. Those who rely on compactness alone as a test for gerrymandering are not aware of how easy it is for district drawers to come up with a compact-looking plan that is still a fearsome partisan gerrymander. Compactness then, like hyper-equal population, can become a snare that encourages judicial acceptance of partisan gerrymandering while ostensibly prohibiting it.[93]

(3) Cutting subdivision lines. The majority district court judges in *Bandemer* noted that if the only goal was to achieve population equality, the Indiana districting plan they voided cut county and municipal lines unnecessarily. For example, they interpreted the corralling of isolated municipalities from outside Indianapolis as an artifice for maintaining Republican advantage in the multi-member districts of Marion County.[94] On appeal, Justice Powell's dissent maintained that the excessive cutting was itself a measure of how much gerrymandering had been done.[95]

The majority weakly responded that at least township lines had been preserved,[96] but that is not much of a saving grace. Townships are the smallest census Minor Civil Divisions (MCDs) by which population figures are published in sparsely populated areas, therefore they must be the building blocks for any districting. A township could not be split because no one would know the population breakdown between the parts. (In more densely populated areas the Census Bureau collects data by "enumeration districts" that can be parts of townships.) More relevant is the fact that states commonly use townships as voting precincts in rural areas, which fits the gerrymanderer's needs when he or she can easily determine the political complexion of a district made up of townships, but cannot easily estimate the vote in split townships. But again, as for other

93. One scholar asserts that compactness is not a neutral measure, but instead always harms Democrats, who tend to be more concentrated in living patterns than Republicans. Lowenstein, *supra* note 4, at 26.

94. Bandemer v. Davis, 603 F. Supp. 1479, 1487 (S.D. Ind. 1984).

95. Davis v. Bandemer, — U.S. —, 106 S. Ct. 2797, 2825 (1986).

96. *Id.* at 2801.

structural measures, the plurality rejected an analysis of the utility of municipal lines in judging whether the districting plan was unconstitutionally discriminatory.

Some authors have claimed that there is merit in not dividing local units between legislative districts.[97] A local government may prefer to deal with a single representative and a single senator, even though a sounder strategy might be to divide itself between two districts and have twice as many representatives accountable to it.

Another argument for preserving local government lines is simplicity and effectiveness for the voter. Every study shows that few voters can identify their representatives. This is not surprising, since voters are presented with long ballots of officials in multiple layers of government. This daunting task for the voters could be simplified somewhat if legislative district boundaries were easily recognizable and relatively permanent. Myopic concern with population equality has required reaching into the next ward in a city for another precinct or into the next county for another township to get the exact quota. Then the next census requires a somewhat new mixture of local units in the various districts even if their population has changed just slightly. This inconveniences voters.

Counties are a socio-psychological reality for rural people, just as physical infrastructure like freeways and railroad tracks represent boundaries for usable space by city people. If those drawing legislative districts ignore commonly accepted boundaries, voters are handicapped. Their political effectiveness is also reduced when political parties choose candidates, and the few delegates from a piece of another county in the same legislative district are considered outsiders and roundly ignored in decisionmaking.

The Supreme Court always appears to be inviting states to use the preservation of local boundaries to justify greater leeway in population size for legislative districts. Some states have taken up the offer: Virginia was allowed a 16.4 percent range allegedly to preserve local sub-unit lines[98] while Wyoming was allowed 89 percent to give even a very small county its own representative.[99]

We believe a population deviation *de minimis* would simplify elections for a number of voters and save a few local units from needless division. As before, however, we suspect that the plea from some quarters to save local units and the way they actually are split, usually masks an attempted partisan gerrymander. Justice

97. Campbell, Alford & Henry, *Television Markets and Congressional Elections*, 9 LEG. STUD. Q. 665 (1984).

98. Mahan v. Howell, 410 U.S. 315, 319 (1973).

99. Brown v. Thomson, 462 U.S. 835, 848 (1983).

Brennan, dissenting in *Mahan*, pointed out that all of the justified population deviation ran against the more liberal Washington suburbs in northern Virginia.[100]

Moreover, attempting to judge districting plans on how much they respect local government boundaries is not easy. How many splits are too many? Is a little split from a single unit as bad as a big split? Are all units equally sacrosanct—are counties more sensitive to state legislation or voter identification than municipalities? The only useful standard compares several plans to determine which one cuts fewer sub-unit lines.

(4) Breaking communities of interest. The district court in *Bandemer* focused on rural areas being conjoined with parts of Indianapolis to illustrate how the district drawers ignored community of interest while seeking to gain greater partisan advantage.[101]

Community of interest as a goal to be sought in districting relates to the local sub-units point just made; any sub-unit of government has substantial interests in common. But the goal of preserving communities of interest comes into play when larger units must be cut, or smaller ones combined to make an ideal-sized district. Within a large unit of government that is entitled to more than one legislative district, cutting the unit in a particular way can clump together people of similar interests, possibly making them a sufficient majority to elect one of their own to the legislature. If the line ran another way, however, they might be split below a critical mass. Similarly, if several smaller units must be combined to make legislative districts, representation would be fairer if those communities with interests in common were aggregated rather than some being put together with very dissimilar components.[102]

Except for race, community of interest is hard to identify. Some scholars have attempted to do it by media markets,[103] but few of these coincide with a single congressional district, let alone with the ordinarily much smaller state legislative districts. In any event, preservation of these non-racial communities of interest is really just a hortatory goal for political decisionmakers to try to define

100. *Mahan*, 410 U.S. at 344 (Brennan, J., dissenting).

101. Bandemer v. Davis, 603 F. Supp. 1479, 1487 (S.D. Ind. 1984).

102. These considerations have arisen most strongly when the community of interest is a single racial or ethnic group, for example Blacks and Hispanics. We should add that leaders of these two groups pursue different strategies. Blacks typically prefer to be concentrated heavily to insure election of a Black representative, whereas Hispanics sometimes seek to spread their population in order to have a significant presence in a greater number of districts. B. CAIN, *supra* note 59, at 46-49, 95, 170.

103. Campbell, Alford & Henry, *supra* note 97.

and include in designing district plans rather than a constitutional principle for judging districts.

In summary, while the structural factors involved in district drawing have some intrinsic value, we do not believe that they rise to the constitutional level of proof of discrimination, as they do for Justices Powell and Stevens. The creation of measurements and standards of acceptability for these factors, however, will serve as constraints on the district drawers' self-interested partisan gerrymandering, a reality that the plurality Justices ignored. As the Supreme Court plurality correctly realized in *Bandemer*, a political measure of partisan effect must be central to the identification of a gerrymander.

B. Discriminatory Effects

The *Bandemer* plurality correctly recognized the primacy of an effects measure for partisan gerrymandering. They get right to the heart of the issue in demanding that someone be hurt before they will intervene. In partisan gerrymandering the injury is to a political party, its adherents who chose it as the instrument for working their will, and its public policy goals.[104]

But the Supreme Court was unable to devise a workable, practicable measure for gerrymandering. The Court looked at the single political measure on which the Indiana district court relied, and rejected it as inadequate.[105] They did not subject the districting plan to any other types of tests, such as the one proposed in our earlier article.[106] In truth, most measures that have been suggested by various scholars are flawed by impracticality, timing problems or by other events.

In the record that came before the Supreme Court, the district court judges had relied on the results of the 1982 legislative elections, which were run on the challenged plan passed by the legislature the previous year. The district court compared the percentage of aggregate vote received by all legislators of each party with the percentage of seats each party had won. This showed that while the

104. Davis v. Bandemer, — U.S. —, 106 S. Ct. 2797, 2806 (1986).

105. Although the Court reversed, it did not find the district court's method or conclusions to be "clearly erroneous." *Bandemer*, 106 S. Ct. at 2816. Justice Powell attacks this result. *Id.* at 2838 (Powell J., dissenting).

106. It should be noted that Judge Pell, dissenting in Bandemer, attempted to use our measure but did so incorrectly. It was, however, used correctly in the Appellee's Brief to the Supreme Court. Additionally, an exhaustive analysis of the Indiana redistricting plan, which applies our methodology, conclusively demonstrates that it was a gerrymander in favor of the Republicans. J. Cranor, G. Crawley & R. Scheele, The Anatomy of a Gerrymander (unpub. 1986).

complaining Democrats had received 51.9 percent of the votes for state House candidates, they won only 43 percent of the seats.[107] This type of measure is commonly referred to as a "seats/votes" ratio.

The plurality found this ratio an insufficiently demanding standard for several reasons: (1) it was based on only a single election; (2) an election may not be predictive, (3) unconstitutional discrimination is more than making it harder to win, and can only occur when "the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[108] We will discuss each of the Court's comments about the measurement of gerrymandering, then critique some other types of measures, and conclude by urging the use of our own.

The first question raised by the plurality was whether the results of a single election are sufficient. Who knows, the plurality Justices asked, whethe Indiana Democrats were truly harmed? Perhaps in 1984 they would do better or perhaps, the Justices opined, the Democrats would be in the majority after the 1990 census and could dictate their own districting plan. Policymaking, however, is going ahead each year in the legislature, and who is in charge directly affects what that policy will be. Why should justice be delayed? As to waiting until the next census, a decade is essentially forever in the career of the average legislator and his partisan supporters. Even worse, gerrymandering is cumulative: the party that ensconces itself in a majority for a decade probably will also be the one that is entitled to draw the districts after the next census. This is a textbook example of justice that is being denied by being delayed.

We argued in an earlier article[109] that a measure of partisan gerrymandering must be made *before* the next election of legislators to be of any practical use. Most measures proposed by others wait

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107. The majority found that:

> Most significant among these many statistical figures is the fact that in 1982 Democratic candidates for the Indiana House earned 51.9 percent of all votes cast across the state. However, only 43 Democrats were elected to seats. *Bandemer*, 603 F. Supp. at 1485.

In dissent, Judge Pell determined that the normal vote in Indiana was 46.8 percent, and then compared this to the actual 43 percent of seats won to support his conclusion that no gerrymander existed. *Id.* at 1502. Judge Pell misapplied our measure. He chose several statewide races to average as a partisan index (a very acceptable procedure), but then compared the statewide index on his measure to the proportion of legislative seats won, rather than subtracting to reach 50 percent and recalculating the index for each district and then counting up the majority's districts.

108. *Bandemer*, 106 S. Ct. at 2810.

109. Backstrom, Robins, & Eller, *supra* note 2, at 1127-28.

until an election has been held under the new plan, note the percentage of legislators elected from one party, and then compare this with the percentage of aggregate of votes for all legislators of that party. This procedure proves faulty on several grounds.

As they begin their task, district drawers must have on hand objective guidelines with which to test various plans that are under consideration, or they have no way, even with the best of intentions, to tell whether they have drawn a permissible plan. Moreover, while court intervention may never be eliminated altogether, we should not encourage litigation in every state after every redistricting by testing with the results of elections held under the new plan. Finally, any measure of gerrymandering that requires a post-election analysis will necessarily be influenced by all of the idiosyncrasies of that election itself.[110]

After appearing to require multiple post-hoc election tests for gerrymandering, Justice White, under attack by Justice Powell,[111] responds that evidence from several elections is not needed to prove gerrymandering; evidence could also include estimates of partisan voting strength from some race *prior* to the enactment of the districting plan.[112] It is encouraging that Justice White ultimately appears to recognize the problem with awaiting post-reapportionment results, but his admission of a predictive measure seems peripheral to the thrust of his argument. This admission is, however, the opening toward what we believe to be the only appropriate measure of

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110. The use of subsequent legislative results involves Monday-morning quarterbacking. In the first place, gerrymandering must be adjudicated before the next election so that an unfair plan is not allowed to operate for one or more times before being judged, because public policy adverse to the disadvantaged group will be passed between that election and a decision by the court. Moreover, Monday-morning analysts are neutralizing the effects of quality candidates and targeted campaign efforts in the legislative contest. What would be the incentive for a party to engage in careful candidate recruitment and vigorous campaign activity if their victory might be denied because their efforts were too successful? The requirement that critics of a redistricting plan wait until a *second* election has been run is worse. That is Tuesday-morning quarterbacking.

The plurality also questioned whether any election results are in fact predictive of subsequent election results. They quote the district court as finding that in Indiana, at least, returns are not predictive. *Bandemer*, 106 S. Ct. at 2812.

This question is misdirected for the same reasons that any post-hoc legislative seats/results analysis is not acceptable: in another year there may be different candidates, different campaigns, different issues, and different voters. The gerrymandering issue should only deal with the partisan voting component of the complex voter calculus. The search for a partisan index should not also have to overcome the burden of non-party components of the vote for specific legislative candidates, which is what happens if legislative seat totals are used to evaluate a districting plan.

111. *Id.* at 2831 n. 10 (Powell, J., dissenting).

112. *Id.* at 2814 n.17. "Projected election results based on district boundaries and past voting patterns may certainly support this type of claim, even where *no* election has yet been held under the challenged districting." (emphasis in original).

gerrymandering—one that does not have to wait for subsequent elections after a districting plan is put into effect.

According to the *Bandemer* holding, even if the result over the long term, or projected results, did show serious[113] partisan discrimination, that may not be sufficient evidence to void a districting plan. It is not enough to show that election of a party's candidates has been made more difficult; the plaintiffs would still have to show that they were excluded from the entire political process: slating, endorsements, nominations, even from casting a vote. It is simply impossible to meet this standard. Requiring plaintiffs to gather proof about the perceptions of persons who did not surface for endorsement, or fashioning tests for what constitutes an effective slate of nominations seems unrealistic. Even more tendentious is the plurality's assertion that minority party voters are not shut out of any consideration by the majority party officeholders.[114] This is the rationale for "virtual representation," which should have been laid to rest by the American Revolution. What is the election about if it is not between candidates who offer somewhat different policy alternatives on at least some questions? Parties matter in elections, and parties matter in legislative decisions. It would be an impossible burden to require a plaintiff to prove that elections are not meaningless, that the representative fails to serve him or her as faithfully as constituents of the member's own party, or that the legislator fails to match the voter's policy preferences on rollcalls.[115]

The plurality recognizes that the redistricting plan must be judged as a whole, that is, it must meet a statewide standard: Are the Democrats (in Indiana) treated fairly? Justice White reasons

113. The district court in *Bandemer* had said that *any* discrimination in districting would be unconstitutional. *Id.* at 2811. The Supreme Court plurality distanced themselves from such standard, fearing an avalanche of cases. Yet until a clear standard evolves—one that can be applied by district drawers at the beginning of the redistricting process—it is likely that virtually every plan will appear in a case for exclusion or inclusion, as happens with most new constitutional tests. Merely announcing that the standards are tough is unlikely to deter further litigation.

114. "An individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district." *Bandemer*, 106 S. Ct. at 2810. This conclusion draws a harsh dissent: "but it defies political realities to suppose that members of a losing party have as much political influence over state government as do members of the victorious parties. Even the most conscientious state legislators do not disregard opportunities to reward persons or groups who were active supporters in their election campaigns." *Id.* at 2830 (Powell, J., dissenting).

115. The plurality Justices make the statement that the most common technique of gerrymandering—"stacking" large numbers of the minority in a few districts to "waste" their votes—does not actually hurt voters. *Id.* at 2814. In fact, that is the primary way vote dilution occurs. What else is there to complain about in a gerrymander? This statement demonstrates that the Supreme Court's grasp of the political realities of gerrymandering is far from complete.

that the design of individual districts is of no particular concern. With that as a given, the plurality Justices chose not to look at structural anomalies like the lack of compactness and the inconsistent use of multi-member districts. This reasoning also shows an unfamiliarity with the practicalities of gerrymandering. Almost certainly the controlling party in the legislature will not have overwhelming dominance throughout the state. They therefore must seize advantages in specific districts, and give up advantages elsewhere by sacrificing those districts which they cannot conceivably draw to ensure a win. In Indiana, the Republican district drawers used multi-member districts where it was to their advantage and refrained from using them where it would have disadvantaged them. The *statewide* result is simply the aggregate of decisions in the design of *individual districts* all over the state. Thus a statewide test for gerrymandering must be made, but the evidence of that result must come from examining local districts; the remedy, if any, will have to be sought by adjusting individual district lines.

Focusing on district results does not mean proportional representation. On one thing every Justice in *Bandemer* is agreed: no one wants proportional representation. Justice White says that reasonable proportionality in results does not have to involve proportional representation in the literal sense, and that any competent and creative district judge could tell the difference.[116] Justice O'Connor and her concurring colleagues are not convinced. In their view, the whole idea of a district system for representatives is a compromise between winner-take-all and proportional representation. She fears that testing the aggregate outcomes of district elections will lead inevitably to a proportional representation standard, which would be fatal for the two-party system in this country.[117]

We demonstrated earlier that single-member districting could never guarantee proportional representation at every level of statewide results, based on the tendency of the majority to gain more than a proportionate share of seats for each increment of additional statewide vote. We termed this the "balloon effect.[118] The balloon effect occurs because, in a single-member district system, any additional votes that one party gets will make a difference first in several marginal districts, tipping them into the majority party's column more rapidly than the proportion by which that party's statewide vote has risen. The courts now seem to understand this "law" and to be willing to live with it. Yet applying a pure proportionality

116. *Id.* at 2816.

117. *Id.* at 2823-24 (O'Connor, J., concurring in the judgment).

118. Backstrom, Robins & Eller, *supra* note 2, at 1134.

standard to statewide results (either aggregate legislative or some base-race totals) will inevitably take from the majority party some of the excess seats that they gain through the balloon effect. We propose an adjustment to insure that this does not occur.

To recap this discussion of the Court's suggested measures for gerrymandering: The plurality correctly focused on requiring a political measure for a political problem—a measure of partisan strength to identify unfair partisan advantage—but in addition they required an overwhelming pattern of state oppression that denies people their elementary right to participate in the electoral process.[119] They have rejected the total legislative seats won/aggregate state legislative vote ratio used by the district court in Indiana to strike down that plan, but they did not reject it for its principal weaknesses: lack of uniformity, *ad hominem* contamination, and untimeliness. They admitted that a predictive measure could be used to identify a gerrymander, yet expressed doubt that election returns are predictive at all. They went on contrarily to suggest the need for examination of returns from multiple elections after a proposed districting plan was enacted.

This bewildering array of precepts can probably be explained as the result of Justice White's need to craft a plurality from a coalition of Justices with very divergent ideas on how to proceed in a new field.[120] Although the Supreme Court's guidelines contain the elements of an adequate measure of gerrymandering, the parts are not yet clear and consistent. District judges will find it very challenging to try to formulate workable measures and standards that

119. The term and concept of "oppression" is taken from, D. Lowenstein, Congressional Reapportionment and the Party System (paper delivered at APSA, Washington, D.C., (1986)).

120. Like the Justices, scholars have not agreed on what is the most appropriate measure of partisan gerrymandering. For example, one writer presents a set of twelve "features"—including such things as district-drawing techniques (packing, fragmenting), incumbent manipulation, unnecessarily disregarding population equality, compactness, and sub-unit boundaries—which indicate the presence of a gerrymander. In addition, three other "flags"—multi-member districts, gross disproportion in seats/results and lack of competition—signal a possible gerrymander. Grofman, *Criteria for Districting: A Social Science Perspective* 33 UCLA L. REV. 77, 117-18 (1985). The problem with this formulation is that all criterial seem equal; there is no guide to what mix of the factors would be determinative, and of course to use the post-hoc seats/results test is unacceptable, as was discussed earlier.

Another prominent scholar concentrates on the "swing ratio"—how much change in seats would result from each percentage point change in percentage of the statewide aggregate vote. Niemi, *supra* note 4, at 194-95. He recommends achieving "symmetry," which means creating districts so that both parties would benefit equally from a given percentage-point change in the statewide vote in their direction. *Id.* at 200-01. We believe that this would be impossible to achieve in real situations, given the lack of uniformity in geographical distribution of partisans in most states. Backstrom, Robins & Eller, *supra* note 2, at 137.

can survive on appeal. We think we can be of assistance in this effort.

IV. A PROPOSED MEASURE AND STANDARD FOR EVALUATION OF GERRYMANDERING

We have now analyzed what the Supreme Court (and others) have recommended about measures of gerrymandering. We will now lay out what we believe to be an appropriate measure and a standard that avoid the pitfalls of other measures.

A. MEASURE AND STANDARD DEFINED

Although the term "measure" has been used by most commentators to encompass everything that the Court must now do to deal with partisan gerrymandering, it is helpful to recognize that there are in reality two concepts involved that should not be confused: measures and standards.

A *measure*, as described above for population, is a device or method of detecting and calibrating disparities. The second concept is that of a *standard*—once a measure of disparity (a largely neutral term) has been agreed on, how great must that disparity be to constitute an inequality (a somewhat value-laden word) or discrimination (implying an intolerable degree). The ultimate standard is how equal between the parties, by the chosen measure of partisan advantage, will the Court require the districts to be? Using the population analogy will make this difference clear. As mentioned, the most commonly used *measure* of population disparity is the deviation of extreme districts from the ideal, while the required *standard* of population equality for congressional districts is anti-statistical perfection—far less than 1 percent deviation from ideal—and for legislative districts expanding permissiveness—almost 90 percent in Wyoming.[121]

In dealing with partisan gerrymandering, first the Court must adopt a measure to ascertain whether and to what degree a disparity is present, and then it must choose a standard of disparity that is acceptable before a specific districting act will be overturned.

B. STEPS IN MEASUREMENT AND EVALUATION

Succinctly, our measure of partisan effects[122] is the number of districts in which the majority party dominates as indicated by the

121. Brown v. Thomson, 462 U.S. 835 (1983).

122. For the full development of the measure, see Backstrom, Robins & Eller, *supra* note 2, at 1131-39. The discussion of standards is new to this paper.

results of a base race. Under our standard, impermissible gerrymandering is present unless that number is 50 percent plus one of all districts. The measure is determined and the standard applied in several steps, which are listed here and then explained in some detail: (1) ascertaining majority party strength in each district; (2) indexing the majority party's actual strength to 50 percent; (3) setting majority rule as the primary value in assessing the fairness of a districting plan; (4) counting the number of districts in which the majority party is dominant. If this is other than just over one-half the districts, the plan is a partisan gerrymander, unless irremediable under given standards of population and possible structural standards.

C. Ascertaining Major Party Strength

To measure the partisanship of individual districts and calculate the degree of overall dominance of a party in a state requires some kind of index.

Our measure is an effects measure, but it does not deliberately guarantee any foreordained *results* of an election. We distinguish between the terms effects and results. Our goal is a fair distribution of districts dominated by each party's supporters. Our first step in that analysis is choosing an appropriate base race for determining party strength.

A partisan base race is a previous statewide election in which the choice between candidates appears to have been determined by partisan sentiments of the voters rather than transient issues or charismatic personal appeal. The vote on this race within each proposed legislative district will be an estimate of underlying partisan sentiment in that district. Such partisan sentiments will *affect* the outcome of the subsequent legislative elections conducted in the several districts, but will not solely determine the subsequent results of the legislative races, either individually or in the aggregate.

We use a statewide base race because it is an election that presents an identical choice of candidates everywhere in the state. In contrast, each legislative race has unique candidates, and some candidates are unopposed; both factors make it impossible to compare the partisan characteristics of precincts at the borders of districts as they are traded back and forth in trial districting plans.

All sides in the lower court in *Bandemer* embraced our concept of a base race, although they differed in how to calculate it in Indiana.[123] In some states, the base race may be a largely "invisible"

123. Brief for Appellee at 12-13 n.15, *Bandemer* (No. 84-1244).

contest (such as state superintendent of public instruction), where individual candidates never mount a major media campaign, and the voters have few cues to guide them in their vote except the party label on the ballot. In other states, it may be a major race in which candidates are evenly matched in name familiarity and personal appeal, leaving partisanship to be the main difference between the candidates. The aim is to arrive at a previous election that represents a kind of "normal vote."[124] A base race does not have to be equivalent to the estimated normal vote of a state to be useful. So long as the race picked correlates highly with other partisan races—that is, it rises and falls proportionately in various parts of the state rather than exhibiting unique fluctuations in various parts of the state—it can be used in our measure.

Courts should not be reluctant to use a base race as a test for gerrymandering. After all, the state political party organizations and legislative caucus leaders are using some kind of a base race to estimate partisan effects of various configurations of districts. That is what the expensive computer consultants use for data.

Because the *Bandemer* plurality shied away from a single indicator of partisan strength, courts may prefer using as the base an average of several statewide races in a single year. We continue to recommend a single race that correlates highly.[125] A multiple-race amalgam may be a more persuasive index to the general public and to judges who are averse to statistics. Averaging several races over

124. The concept of the normal vote was developed by Philip E. Converse. *See* A. CAMPBELL, P. CONVERSE, W. MILLER & D. STOKES, ELECTIONS AND THE POLITICAL ORDER 9-39 (1966). The normal vote was to be the division between the major parties in a hypothetical race in which only the partisan factor was operative. The normal vote in a state is often developed with the use of survey research findings of statewide party identification distribution. Survey data is not, however, suitable for establishing base-race data for each proposed legislative district needed for a measure designed to identify gerrymandering, because it is prohibitively expensive to conduct adequate surveys in each tiny subarea of a state. Techniques have been developed to estimate distributions of individual voter characteristics within small geographic areas by noting the relationship of various attitudes to certain demographic characteristics statewide, and then using small area census figures to find out how many people of those census types reside in the area and assuming they exhibit the same attitudes as their statewide cohorts. But this statistical procedure rests on assumptions and manipulations that are too sophisticated for easy judicial and popular acceptance.

Another possible database on which to estimate party identification is registration data. In the states that require pre-registration by party choice, some information is available. If these data are used, it would be necessary to ignore registered independents. When actual voting results are used, most of these independents have sorted themselves out by choice between the major-party candidates. In fact the party registrants are under no compulsion to vote in accordance with their registration, so the voting figures also reflect their actual partisan behavior.

125. Our calculations for Minnesota have shown an in incredibly high correlation (above $r=.90$) between the race we selected for use and other statewide races the same year and in previous years. That being true, no explanatory power would be gained by melding other similar races with the leading one.

several years is less suitable because assumptions about the effect of rising and falling total vote on individual districts operate only at one point in time.[126] Moreover, the difficulties of matching precincts over the years pose an immense, practical burden on the data gatherers.

D. Indexing Majority Party Strength to 50 Percent

Only in a rare state (like Indiana, as shown in the *Bandemer* briefs)[127] will a statewide party index be exactly at or very near to 50 percent. In most circumstances the actual statewide base race percentage of a majority party must be reduced to 50 percent overall, with concomitant reductions in the base race distribution for each proposed district.

This adjustment is made by reducing the actual vote in each precinct by a uniform figure—the difference in percentage points between the actual statewide base race and 50 percent. In the example in our previous article, where the Minnesota statewide base race was 54 percent, we subtracted 4 percentage points from the actual base race percentage in each precinct in the state to yield an index percentage. That number was then multiplied by the total number of actual raw votes cast in that precinct for the base race candidates to arrive at a new "vote" total for the majority party. Finally, these new precinct "votes" were added together for each proposed district and its index percentage was computed.[128]

Legislative districts are apportioned on the basis of full population count rather than eligible voters, registered voters, or actual voters, while political measures are typically based on actual votes. As a result, statewide vote totals underweigh the effect of low-turnout districts. One scholar urged that aggregating the *percentages* on the base race in each district to a statewide total and then averaging them will compensate for this. The process yields a mean district vote percentage for each party, rather than pooling raw votes and then calculating a statewide percent, as we have done.[129] This adjustment would have the effect of treating all districts equally in the calculation of a statewide base race percentage, just as they are drawn equally in population. We maintain, however, that while districts are and should be equal in entitlement to a representative,

126. Scarrow, *supra* note 4.

127. Brief for Appellee at 13, *Bandemer* (No. 84-1244).

128. This uniform percentage reduction is not represented to be a statement of historical outcomes in the United States. Rather, it is an index at one point in time that shows a party's base race percentage. If a party were to drop by a certain number of percentage points, the calculation shows in how many districts that party would no longer be in the majority.

129. Lowenstein, *supra* note 4, at 52.

they should lose or gain potential impact in partisanship by their actual turnout. Since children and nonvoters are now counted in apportioning representatives, we believe that averaging district percentages rather than adding actual turnout of voters to the state levels in effect would be counting them twice. A court could, however, adopt either method.

E. Choosing a Standard of Fairness

Next, a standard must be chosen for determining a fair distribution of partisan advantage.

Because it seems to us that the essence of a fair districting plan is whether the majority party (indexed to 50 percent) is dominant in a majority of the districts, we use this as a starting point, or fulcrum. If the statewide strength of a party is greater than 50 percent, the number of districts in which that party would be in a majority would swell rapidly; likewise, as the erstwhile majority party's strength drops below 50 percent, the number of districts in which it is dominant would fall much faster.[130]

Thus we do not require proportional representation—remember that we are not evaluating actual legislative election results—but we do use dominance in 50 percent of the districts as a starting point when the majority party's statewide strength is indexed to 50 percent. This is the reasonable proportionality that we think Justice White is seeking,[131] while avoiding actual proportional representation. We cannot emphasize strongly enough that our measure does not guarantee any party any specified *result* after an election. The goal being sought is fairness in the *opportunity to be elected* (from a partisan base standard) that is granted before any election. This is the "level playing field" argument.

A prominent reapportionment scholar cited earlier argues that the only required criterion for a fair districting plan should be that the swing ratio be high, thus insuring volatility in numbers of seats held as statewide party fortunes fluctuate.[132] He does not, however, specify a starting point; apparently any division of districts would be acceptable to him. In our opinion, this is not an adequate standard for identifying a gerrymander.

Another frequently espoused goal for fair districting plans is to have as many competitive districts as possible.[133] The idea is that

130. Backstrom, Robins & Eller, *supra* note 2, at 1134 n.43.

131. Davis v. Bandemer, — U.S. —, 106 S. Ct. 2797, 2816 (1986).

132. Niemi, *supra* note 4.

133. Mayhew, *Congressional Representation: Theory and Practice in Drawing the Districts*, in REAPPORTIONMENT IN THE 1970S, 249, 255-62 (N. Polsby ed. 1971). What consti-

the party out of power would have an excellent chance of capturing legislative seats. We do not think, however, that high turnover in state legislatures should be a constitutional requirement. It may not even be a desirable goal, as some stability of membership is useful in a legislative body. Besides, competition that gives voters an effective choice does not have to be confined to the general election, since districts that do not appear to be competitive by that standard could experience serious challenges in primaries. The critical weakness in using only competitiveness as a goal for fair districting is that it ignores the overall number of districts in which each party dominates. A plan could be very unfair to the majority (or the minority) with their only sop being a promise that many of the opposition are vulnerable in some future election.

F. Deciding Whether a Plan is a Gerrymander

The final step in deciding whether a districting plan is a gerrymander is to count the number of districts in which each party dominates (measured by the index base race). If this is other than one over 50 percent of the districts, a gerrymander is present, unless further adjustments of district lines are impossible.

If the districting plan gives unfair advantage to one party, the appropriate remedy is to draw a new plan that is less unfair. It will not always be possible, however, to draw a completely fair plan. It could be that the residential concentration of one party's adherents in a state is such that their strength cannot be spread among more districts without violating accepted standards of compactness. In these instances, the best surviving plan, even if it is still somewhat unfair, should not be judged a gerrymander that requires correction. We do not, however, believe this would be a common problem; we have shown earlier that it is relatively easy to make minor adjustments in districting lines to achieve a fair plan.[134]

G. Decision Rules

By way of summarizing our argument, here are decision rules for ascertaining the presence of partisan gerrymandering:

1. Test a plan before enactment, or if an act is under judicial challenge, before an election has been held under it.

2. Establish a *de minimis* standard of population equality—we urge 5 percent for state legislative districts and 1 percent for

tutes competitive districts has been extensively debated. *See* Pfeiffer, *The Measurement of Inter-Party Competition and Systemic Stability*, 61 Am. Pol. Sci. Rev. 457 (1967).

134. Backstrom, Robins & Eller, *supra* note 2.

congressional districts—and reject any plan that does not meet that standard.

3. Allow no partial or new use of multi-member districts.

4. Test the districting plan that results by an adequate political measure—similar to the one we have outlined above—and, if the plan does not meet the standard of base majority rule, declare it unconstitutional.

5. If no alternative plans are fair, measured by the same criterion, a court-appointed master should be directed to develop a plan that meets the standard.

6. If more than one proffered plan is fair politically, compare them as to visual compactness, adherence to subdivision lines, asserted community of interest, and reasonably neutral treatment of incumbents; select the plan that achieves the highest quality according to these considerations.

In summary, our measure relies centrally on a political index, as the Supreme Court plurality now requires. But our index is independent of individual legislative candidate effects. It is forward-looking, as permitted by the Court, rather than retrospective. Our standard is that of majority rule. It does not penalize the majority for the bonus it will receive in a single-member district system by applying a crude proportional representation standard. But it also does not guarantee any victories to one party or the other in the subsequent election. It instead provides a fair starting point from which parties can vie for advantage.

We are not sanguine that courts would readily accept a standard as fine-tuned as ours, which requires new districts to be drawn if changing a single district would make the plan fairer. It seems more likely, given what the Supreme Court has said about willingness to tolerate some gerrymandering, that district judges and the Supreme Court eventually would adopt a band of tolerance—not changing a districting plan even if the majority were in the majority in a few more or less districts than our measure shows them to deserve. We would not view this as a negation of our approach.

But we strongly urge that the courts avoid two pitfalls that endanger majoritarian principles. First, any leeway should be unidirectional, that is if an actual statewide majority party is dominant in fewer than half of the districts it should be brought up to the minimum. Second, if courts should fail to honor the inevitable single-district balloon effect by using an unadjusted proportional standard as the test of fairness, the majority principle will have been violated, in effect, by giving a majority party less than 50 percent dominance when their strength is 50 percent.

The most common result of gerrymandering, however, is not endangering majority rule, but rather the majority party's arrogation of dominance in far more seats than it is entitled to. This is unfair, and should not be overlooked. That is what the entire anti-gerrymandering exercise is about.

V. CONCLUSION

Solving partisan gerrymandering turned out to be less tractable than rectifying population inequalities. A solution is necessary, however, to insure fair election procedures.

The *Bandemer* decision announces that it is time to move toward an acceptable measure of partisan gerrymandering. There is at present no Supreme Court majority for any one measure of partisan gerrymandering. The Justices' statements may be seen either as (at best) a cry for assistance to develop an acceptable measure or (at worst) a Catch 22 that outlaws gerrymandering, but establishes a test that can never be met.[135]

Tackling gerrymandering is technically difficult, but it is not a thicket. The theoretical concept of gerrymandering is simple and

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135. Unfortunately, the next partisan gerrymandering case likely to come through the court system will be on congressional districting. A suit challenging California's congressional districting was set aside until *Bandemer* was settled, and is certain to be reactivated. Districting for congress and for the state legislatures is different in several regards. First, congressional districting is *derivative* and decentralized, while state legislative districting is primary and self-contained. That is, the state legislators, in most states, district for themselves, while the state legislators and not the congressmen district for congressional seats. This means that state legislators have a fundamental conflict of interest in the state instance, necessitating greater outside scrutiny. Also, the whole state legislative policy machine is built through one districting act by a legislature, while the overall membership of Congress comes as the result of fifty separate congressional districting acts. No one state redistricting can determine, or even substantially affect, the partisan balance in Congress. Further, if a legislature is gerrymandered, control of the next redistricting for itself and for Congress could also be affected. If a legislature is fairly districted, however, that state's congressional districting is likely to be fairer, and a change of control for the next districting for both legislators and congressmen is more likely.

Our *measure*—the base race domination of individual districts—applies in testing a congressional districting plan as well as a legislative plan. But our *standard*, given many fewer congressional seats in general, becomes lumpy (in a three-seat state having only 100%, 67%, 33% and 0% of the seats to aim for). Of course, our standard of majority dominance could apply only state delegation by state delegation, rather than addressing the important question of overall control of the United States House of Representatives.

Even justiciability of congressional districting could be challenged—although the present Supreme Court seems unlikely to agree—on the grounds that the narrow definition of "political question" as affecting separation of powers would prohibit the federal judiciary from interfering with the election procedures of its co-equal branch, Congress. D. Lowenstein, *supra* note 119.

It would indeed be unfortunate if the special problems involved in handling congressional gerrymandering were to impede the development of a measure and standard to correct the more important and more tractable problem of state legislative gerrymandering.

clear. No one can seriously defend gerrymandering, and the media and the public will support anti-gerrymandering strictures.

Despite our confidence in our measure, courts may not be ready yet to give any specific political measure constitutional status. This is not discouraging. Even population disparity measures, which now seem so simple, took many years to develop to their present level of acceptability. We should expect at least as difficult a search before full agreement is reached on a specific measure of partisan gerrymandering. We have no doubt, however, that the measure that will ultimately be adopted will be of the type we first presented in 1978, which subsequently has received increasing attention. We present it here in a modified form that we feel will be more useful to courts and legislators who now, after *Bandemer*, must come to grips with this question.

Justice White conceded that it was not likely that the equivalent of the arithmetic one person/one vote standard could be achieved in partisan gerrymandering cases.[136] But standards are transparently obvious in very few instances. Courts are frequently faced with degrees of uncertainty and conflicting testimony. There is no reason to hold partisan gerrymandering cases to higher standards of certainty and agreement. The gravity of the evil and the inability to obtain redress elsewhere require judicial action to fulfill the promise of relief annunciated in *Bandemer*.

Cogent standards on gerrymandering will improve the whole process of redistricting. If clear fairness standards exist, legislators will be more hesitant to breach them, resulting in a reduced need for judicial intervention. Moreover, redistricting is not inherently a legislative function. If there were less partisan advantage to gain, legislators would be more willing to delegate that power to non-legislative reapportionment commissions in the states where legislatures are the exclusive districting authority. But we do not believe that a fair districting plan is automatically guaranteed because it is drawn by a neutral source. Courts must retain the ultimate right to apply appropriate standards to test contested plans for fairness to the major political interests of the state.

136. Davis v. Bandemer, — U.S. —, 106 S. Ct. 2797, 2805 (1986).